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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 707.

THE UNITED STATES, PETITIONER,

VS.

GENERAL CASUALTY COMPANY OF AMERICA, CENTRAL SURETY AND INSURANCE CORPORATION, WACKER CORPORATION, AND N. E. DAUGHERTY, DBA N. E. DAUGHERTY CONSTRUCTION COMPANY, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

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Authorities Cited

P. L. 356, 83d Cong., 2d Sess. 1, 5, 7, 10
U. S. Code Congressional and Administrative News 1954, Vol. 1, page 2191 et seq. 5

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The opinions below and jurisdiction are fully stated in the petition for the writ.

QUESTION PRESENTED.

P. L. 356, 83d Cong., 2d Sess., provides that an executive decision under the "finality clause" of the standard

form government contract "shall be final and conclusive unless the same is * * * arbitrary * * * or is not supported by substantial evidence." The question presented is whether the Court of Claims misinterpreted the statute in these cases by substituting its own judgment on the facts for the choice made by the department officers between two conflicting views.

STATEMENT.

The subject case arises out of a contract for construction of an airport at Zanesville, Ohio, the Government acting by and through Civil Aeronautics Administration in charge of the work; the contract included Article 15, providing that all disputes involving questions of fact shall be decided by the contracting officer, subject to appeal to the head of the department whose decision shall be final and conclusive upon the parties thereto.

Claims were made for additional payments by reason of changed conditions and other causes, the claim to which petition herein is directed is a changed condition found in removing rock and shale excavation, the conditions found being altogether different and opposed to representations by plans and specifications prepared by the Government.

From adverse decisions by the contracting officer and head of the Department of Civil Aeronautics, suit was brought in the Court of Claims resulting in the Court's opinion shown in full at page 42A in the petition herein. The Court of Claims concluded that the administrative decision was arbitrary and was not supported by substantial evidence (App. p. 54A).

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The specifications (quoted in the Court's opinion pp. 49A-50A) provided that all excavated material would be classified as "Grading" or "Rock Excavation." Detailed plans showing the location and results obtained in some 35 borings made by the Government at intervals over the length of the work, which were amplified by a table of soils characteristics, are shown on pages 11 and 12 of the contract plans (Pl. Ex. 2), which were shown to inform bidders of the kind, type and degree of density or hardness indicated as a result of the borings. Borings were defined in the specifications "* * * and the character and depth of material found are believed to be approximately correct" (p. 50A).

The specifications required further that bidders were expected to inspect the site and acquaint themselves with local conditions and the Court found (Fdg. 31, p. 77A) that the inspection of the site gave no indication that materials any different from those represented on the contract drawings would be encountered.

In the course of excavation Respondents encountered 216,755 cubic yards of shale which they contended constituted rock within the contract definition (Fdg. 36, pp. 80A-81A) which for removal required much greater power, effort and expense than was represented by the plans and specifications to be necessary, since Plaintiff did not have and was unable (in 1943-4) to obtain equipment and supplies required for drilling and blasting (Fdg. 38, pp. 82A-83A).

By agreement a test was made to determine whether certain of the type of material claimed as hard shale could

be moved with the specified shovel, which the Commissioner found could be done with difficulty, requiring several passes with the bucket to get a load where in dirt or clay such would not have been necessary; however, as a result of this test the Government refused to pay for rock, classifying the material as excavation, obviously by reason of the fact that the 3/4 yard shovel could finally move the material without regard to time or expense, and also to the further fact that no actual blasting had been done as defined in the specifications. In the denial of the claim by the head of the Department, the decision was based upon the fact that only two types of excavation were defined by the contract, and, since no blasting was done, the material claimed as rock must therefore be classed as excavation, no consideration being given to the question of an unforeseen or changed condition in the material found and claimed.

The opinion of the Court of Claims held that the borings and data furnished by Government were inadequate, that shale was encountered in locations and amounts seriously in excess of plan indications, and that in these respects the contract drawings were not approximately correct (Fdg. 31, p. 77A); further, that protest of a changed condition was timely made to the engineer in charge who was the authorized representative of the contracting officer, but the engineer did not transmit such information to the contracting officer until a much later time (p. 53A; Fdg. 33, p. 79A); that by reason of these facts and the failure to make an equitable adjustment by reason of such changed condition, the determination was arbitrary and was not supported by substantial evidence (p. 54A).

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The Court found further that the 216,755 cubic yards claimed as rock were neither rock nor grading within the terms of the contract, but was hard laminated shale of a kind not shown on the contract drawings nor by defendant's original borings and found further that a reasonable price for same would be 65¢ per cubic yard, for which allowance was made because of a changed condition. Actual samples excavated from the work in 1943 are in evidence as plaintiff's Exhibits 8a to 20a inclusive, and are available in the Court of Claims and photographs of these samples are in evidence under the same Exhibit numbers.

REASONS FOR DENYING THE WRIT.

In the Wunderlich case the Court said * * * "The decision of the department head, absent fraudulent conduct must stand under the plain meaning of the contract." The Court stated further "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." That determination by this Court received the attention of Congress, resulting in the adoption of P. L. 356 quoted in full at page 3 of the petition herein, the legislative history of which is of particular interest. The following excerpts are quoted from U. S. Code Congressional and Administrative News 1954, Vol. 1, page 2191 *et seq.*, l. c. 2194:

* * * * * * *

> "After extensive hearings it has been concluded that it is neither to the interests of the Government nor to the interests of any of the industry groups that are engaged in the performance of Government contracts to repose in Government officials such unbridled power of finally determining either disputed questions

of law or disputed questions of fact arising under Government contracts, nor is the situation presently created by the Wunderlich decision consonant with tradition that everyone should have his day in court and that contracts should be mutually enforceable. A continuation of this situation will render the performance of Government work less attractive to the responsible industries upon whom the Government must rely for the performance of such work, and will adversely affect the free and competitive nature of such work. It will discourage the more responsible element of every industry from engaging in Government work and will attract more speculative elements whose bids will contain contingent allowances intended to protect them from unconscionable decisions of Government officials rendered during the performance of their contracts.

A principal change which the amendment effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official vested with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in *Ripley* v. *United States,* 223 U. S. 695, 32 S. Ct. 352. The standards of arbitrariness and capriciousness in relation to the review of administrative action were also prescribed in the Administrative Procedures Act (act of June 11, 1946, Ch. 324, Sec. 10, 60 Stat. 243; 5 U. S. C. 1009). There is a wealth of judicial precedent behind these standards of review and it is the committee's belief that they should not be abandoned."

* * * * * * *

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"No witness before this Committee, Government or otherwise, has offered any justification for the reservation of the right of a Government official to finally declare the law of a contract or to finally interpret the legal effect or meaning of the contract documents. There is no justification for the assumption of such a duty which normally reposes in the judiciary branch of the Government."

* * * * * * *

"* * * Many of the contracts upon which present disputes are pending were entered into prior to the time that the Wunderlich case was decided and at a time when the persons involved therein understood that judicial review was available to them on a less restricted basis than that of fraud."

Petitioner states that this Court has repeatedly held that the finality clause in question precludes independent judicial review of the evidence but the Congress has stated in P. L. 356 that a judicial review may be had of an administrative determination which shall be final and conclusive, unless any one or more of the five elements stated are found by the Court, the elements being "fraudulent," "capricious," "arbitrary," or "so grossly erroneous as necessarily to imply bad faith," "or is not supported by substantial evidence." In the subject case the Court has found that the administrative decision was arbitrary and that it is not supported by substantial evidence (p. 54A).

In belaboring the term "substantial evidence," petitioner refers to a presumption that the agencies dealing with similar questions are equipped or informed by experience to deal with a specialized field of knowledge

whose findings carry the authority of an expertness which Courts do not possess and therefore must respect.

The language of the decision of the department head shows that the decision was based on one fact only—ignoring completely any tests and observations during construction and Article 4 of the contract in particular—that no blasting was done, which was an agreed fact, requiring no expert or specialized field of knowledge to decide. This self evident fact is fully sufficient to support the Court's finding that the failure to make an equitable adjustment was arbitrary and not supported by substantial evidence.

Petitioner complains that the Court of Claims "wrote a new, materially different, contract for the parties by awarding respondents judgment for the shale at the intermediate price of sixty-five cents, (P. 23); however, the shale was a changed condition for which the contract required an equitable adjustment to be made. The decision of the contracting officer and department head was in fact an interpretation of the legal effect of the contract and therefore not conclusive.

"Two conflicting views" does not exist in the case at bar since the decision of the contracting officer and affirmed by the department head was not one of fact but was one of law, in that the conclusion was based upon the determination that since but two classes of excavation were provided in the specifications, no condition found, regardless of its nature, would justify a third or any different classification, ignoring the fact that the contract provides that an equitable adjustment shall be made when a changed condition is found. The foregoing statement is

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fully supported by the following quotation from the decision of the department head (shown at page 85A):

* * * * * * *

"Item 1 of your claim deals with the excavation of rock and shale and is based on your contention that the plans and drawings forming a part of the contract did not accurately describe the conditions actually encountered. Notwithstanding the merit of your argument I do not believe that such contention has any bearing on the matter at issue. * * *

* * * the contract provides for two types of excavation—unclassified excavation at 25 cents per cubic yard, and rock excavation at $1.35 per cubic yard. It is mutually agreed that no drilling or blasting was resorted to in performing the excavation with the exception of 689 cubic yards for which you have been or will be paid at the contract price of $1.35 per cubic yard.

In effect, your argument with respect to this item of the claim attempts to set forth a third classification for excavation to provide for an intermediate price between that provided for unclassified excavation and that provided for rock excavation to take care of the material which you claim was removed under great difficulty both in time and expense and delay in progress, although such material did not require drilling or blasting. I can see no basis for such a revision of the contract. The contract is clear and specific with respect to the two types of excavation and inasmuch as the material removed did not fall within the definition of 'Rock Excavation' as set forth by the contract, there is no authority for classifying such material as rock or for paying for its removal at any price in ex-

cess of the 25 cents per cubic yard specified by the contract for unclassified excavation."

These facts were recognized by the Court of Claims as shown and stated in its finding No. 42 (page 86A).

The foregoing makes clear the fact that the principles which Petitioner seeks to establish in support of the Writ are left without foundation or support and furnish a conclusive reason for denial of the Writ.

The contract document contains the agreement of the parties, the specifications are a detailed description of the work to be done, which is more fully shown and illustrated by the plans; however, the contract document governs the obligations and conduct of the parties and therefore Article 4 of the contract is paramount to the specifications and the provision for an equitable adjustment, in the event a changed condition is found, must rule and qualify the provision of the specifications, limiting the classification of excavation to two classes only.

We submit that it would be difficult indeed, if not impossible, for this Court to define the areas within which P. L. 356 may be applied, since the statute specifically states five distinctly different grounds upon which the finality of a departmental decision may be reversed; moreover, we submit that the language of P. L. 356 is clear and unambiguous and that only in a case decided by the Court of Claims for cause not included in the Act would this Court reverse the decision.

CONCLUSION.

For the reasons stated herein respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

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